United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1581

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROBERT R. FELTON, *et. ano.*,
Plaintiffs-Appellants,

—against—

WALSTON AND CO., INC., *et al,*
Defendants-Appellees

BRIEF OF DEFENDANTS-APPELLEES MARINE MIDLAND BANK—NEW YORK AND JOEL BROWNSTEIN

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Plaintiffs appeal from an order of the United States District Court for the Southern District of New York (Hon. Dudley B. Bonsal, Judge) which dismissed their third amended complaint for failure to comply with the requirement of Rule 9(b) of the Federal Rules of Civil Procedure that charges of fraud must be pleaded with particularity. The order of dismissal was without leave to amend, and also stated that "the Court would deny plaintiffs' motion for an order permitting this action to proceed as a class action". Judge Bonsal's decision is not reported; it is reproduced at 555-563a.[1]

[1]The Appendix is cited herein as "a". Plaintiffs are also submitting separately copies of the transcript of plaintiff Felton's deposition; unless a page is in the Appendix, that transcript is cited herein as "F".

Questions Presented

Was the holding that the third amended complaint did not plead fraud with the particularity required by Rule 9 within the sound discretion of the District Court, in accordance with established precedent in this Circuit?

Where plaintiffs' four complaints had each been dismissed for failure to satisfy a fundamental pleading requirement of the Federal Rules of Civil Procedure, was the District Court's dismissal without leave to replead within its discretion and in the interests of justice?

Where the District Court found that plaintiff would not fairly and adequately protect the interests of a class, and that it was not apparent that there were questions of law and fact common to the class, was the denial of plaintiffs' motion for class action certification within the discretion of the District Court?

Federal Rule Involved

Fed. R. Civ. P. 9—Pleading Special Matters

. . . .

> (b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Statement of the Case

Plaintiff Robert R. Felton commenced this action *pro se* by service of the summons and complaint on May 17, 1973.

The "class action complaint" (9-17a), pleaded wholly upon information and belief, named as defendants Walston & Co., Inc., Mr. Felton's stockbroker; James Nissan, the Walston registered representative who handled Mr. Felton's account; 3i Co./Information Interscience Incorporated [hereinafter "3i"]; Gerald Brodsky, 3i's former president; Marine Midland Bank—New York ("Marine Midland"); and Joel "Doe", an alleged Marine Midland employee. Marine Midland's motion to dismiss the original complaint for failure to satisfy Rule 9(b) was granted on August 2, 1973, with leave to serve an amended complaint (2a).

Mr. Felton served the first amended complaint (35-71a) on August 14, 1973, naming as defendants, in addition to those in the original complaint, five European corporations,[2] nine individuals, and Main LaFrentz & Co., former independent auditors of 3i.[3] Joel Brownstein replaced Joel "Doe" as the alleged Marine Midland employee. The first amended complaint is pleaded in seven "counts" and 180 paragraphs, and purports to allege claims primarily under Section 10(b) of the Securities Exchange Act of 1934 and the SEC's Rule 10b-5,[4] in connection with transactions in 3i common stock. The first amended complaint was pleaded entirely upon information and belief.

Under the first amended complaint, defendant Brownstein is alleged to have prepared a "report" on 3i which

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[2]Three of the European corporations moved to dismisss the first amended complaint for lack of personal jurisdiction, a motion which remained undecided in the order dismissing the third amended complaint (563a).

[3]Plaintiff did not seek leave of court to add parties as required by Fed. Civ. P. 21.

[4]Each of the four complaints in this action also alleges violations of "the statutory law of the State of New York" and "common law principles" (9a, 57a, 207a, 490a) in addition to violations of the federal securities laws; none of the complaints specifies which "statutory law" or "common law principle" was violated, and none identifies which alleged acts violated which set of statutes or principles.

contained "false and/or misleading statements and [omissions] to state material facts which were necessary to be made in order not to make such statements misleading to plaintiff" (69a). Brownstein was also alleged unlawfully to have "acted in concert" with other defendants to defraud the plaintiff (67a). The sole allegation against Marine Midland in the first amended complaint, in Count VII, reads:

> Defendant Marine Midland failed to exercise reasonable supervision over defendant Brownstein to prevent [Brownstein's alleged misconduct]; defendant Marine Midland by its silence and inaction permitted defendant Brownstein to defraud, deceive and/or mislead plaintiff . . . . (70a)

All defendants who were served answered the first amended complaint in September, with general denials (85a, 93a, 103a, 108a, 160a, 168a).

Meanwhile, Marine Midland had noticed the deposition of Mr. Felton for July 13, 1973 (20a). The deposition was later adjourned to August 1 by consent order (21-22a); during oral argument of Marine Midland's motion to dismiss the original complaint, Judge Bonsal stayed discovery pending service of the first amended complaint. Following service of the first amended complaint, plaintiff and Marine Midland agreed that plaintiff's deposition would commence on August 27 (79a); plaintiff failed to appear for deposition and his default was noted on the record (81a). After plaintiff notified counsel for Marine Midland that he would not appear on any agreed upon date (84a), Marine Midland moved the District Court for an order setting a date for the deposition of plaintiff (72a). By notice of motion returnable the same day, plaintiff cross moved for an order setting a date for the deposition of defendant Brownstein and for production of documents by

Marine Midland (3a). Although plaintiff agreed in open court to completion of his deposition prior to his examination of defendant Brownstein, he refused to sign a proposed order to that effect prepared by defendants' counsel. Judge Bonsal approved that order, which required plaintiff to appear for deposition on October 9 (166a). Defense counsel finally took plaintiff's deposition on October 9, 10, 12 and 15,[5] and plaintiff took the depositions of defendant Brownstein on October 16 and 17 and of defendant Nissan on October 30 and November 1.

By notice of motion dated October 29, returnable November 12, Mr. Felton moved for leave to serve a second amended complaint on the stated basis that "plaintiff has just learned of the existence of the additional facts stated [therein] and that justice so requires" (178a). The proposed second amended complaint (179-222a), also pleaded entirely upon information and belief, consisted of seven counts and 196 paragraphs. Although plaintiff Felton again made no motion to add parties defendant under Fed. R. Civ. P. 21, in the proposed second amended complaint he sought to add as defendants Marine Midland Banks, Inc., the Buffalo, New York parent company in the Marine Midland system; the nine other banks which with Marine Midland Bank—New York provide banking services throughout New York State; and Dreyfus-Marine Midland, Inc., an investment management company fifty per cent owned by Marine Midland Banks, Inc. All ten of the constituent banks and the holding company were lumped under the single designation "Marine Midland" in the proposed second amended complaint (183-184a), although no specific activity was alleged against any one or against Dreyfus-Marine.

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[5]As noted, copies of the transcript of this deposition have been separately submitted to this Court.

Marine Midland and Brownstein opposed plaintiffs'[6] motion to amend, which was argued to the District Court on November 12, 1973, with decision reserved. On November 19, 1973, plaintiffs' motion for class action certification was on the calendar for hearing (172a). Prior to argument Judge Bonsal *sua sponte* dismissed the first amended complaint and the proposed second amended complaint, stating that neither complied with the requirements of Fed. R. Civ. P. 8 that a pleading consist of "a short and plain statement of the claim", or the requirements of Rule 9(b) that allegations of fraud be pleaded with particularity. The dismissal was with leave to serve a further amended complaint.[7]

Plaintiffs served their fourth complaint (489-502a), also pleaded entirely upon information and belief, on November 29, 1973, naming the same defendants as in the proposed second amended complaint. All defendants, except Walston & Co. and Nissan, immediately moved to dismiss the third amended complaint for failure to plead fraud with the requisite particularity (503a, 519a, 523a, 525a, 528a), with defendant Main LaFrentz & Co. alternatively renewing its motion for summary judgment initially made under

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[6]The original complaint, the first amended complaint, and the proposed second amended complaint were all brought only by plaintiff Robert R. Felton. By notice of motion dated November 8 (295a), plaintiff Felton moved under Fed. R. Civ. P. 15(a) further to amend the complaint to add Edward J. Egan as co-plaintiff. The proposed new complaint (303a) is identical to the proposed second amended complaint except for the addition of Mr. Egan as plaintiff. Although the motion to permit Egan to join as co-plaintiff was never formally decided, the third amended complaint was pleaded on behalf of both Felton and Egan, and Judge Bonsal treated the two as co-plaintiffs in his order dismissing that complaint (558a).

[7]Although the matter is not particularly relevant to Judge Bonsal's decision dismissing the third amended complaint (see pp. 15-16 *infra*) Judge Bonsal *did* indicate on November 19 that his granting of leave once more to amend was to permit a final amended complaint. Plaintiffs' statement in their brief (p. 8) to the contrary is not correct.

the first amended complaint and reasserted in opposition to the proposed second amended complaint (223a, 348a). By order and memorandum decision filed March 29, 1974, the District Court granted the motions to dismiss without leave to amend (555-563a); the Court stated it "did not reach" Main LaFrentz's motion for summary judgment (563a).

Each of the complaints pleads class claims under Fed. R. Civ. P. 23(b)(3). In the original complaint the "class" is defined as

> [P]ersons and business organizations who purchased securities of defendant [3i] from defendant Walston & Co., Inc. and/or through the fiduciary department of defendant Marine Midland Bank-New York and were damaged by the acts hereinafter detailed. (11a)

In the first amended complaint the class is expanded to include

> [T]hose persons and business organizations who purchased securities of defendant [3i] and were damaged by the acts hereinafter alleged. (36a)

In the proposed second amended complaint and in the third amended complaint, the class is narrowed, to

> [T]hose persons and business organizations who purchased securities of defendant [3i] from December 10, 1970 to October 24, 1972 and were damaged by the acts hereinafter alleged. (181a; 490-491a)

Plaintiff Felton first moved for class action certification by notice of motion filed September 12, 1973, returnable October 15 (113a). When plaintiff refused to consent to an adjournment of the class action motion to an appropri-

ate date after completion of plaintiff's deposition, Marine Midland and Brownstein sought an adjournment by motion (172a); the return date was finally adjourned on consent to November 19. Although, as noted, the class action motion was not argued, Marine Midland and Brownstein, and other defendants, filed memoranda in opposition, and plaintiff Felton submitted a memorandum, an affidavit (115a), and a lengthy reply memorandum. In the order granting defendants' motions to dismiss the third amended complaint, Judge Bonsal noted that "the Court would deny the plaintiffs' motion for an order permitting this action to proceed as a class action" (563a). Judge Bonsal found that "plaintiff Felton, though an attorney, is a single practitioner whose experience has been in the 'negligence field', rather than in securities litigation" and that he "has never before been designated a class representative nor . . . counsel to a class in any sort of class action", and concluded that Felton was not qualified "adequately to protect the interests of the class he seeks to represent" (563a). Judge Bonsal also found that the "conclusory allegation of conspiracy" in the complaint was not sufficient to persuade the court that "questions of law and fact sought to be raised [in the complaint] are common to the alleged . . . class; nor is it apparent that if there are such common questions, they would predominate over individual questions" (563a).

By notice of appeal filed April 22, 1974, plaintiffs appealed from the order of dismissal, and in their statement of issues under F. R. A. P. 30(b) challenged the adverse class determination as well.

Argument

I

THE THIRD AMENDED COMPLAINT DOES NOT MEET THE REQUIREMENTS OF RULE 9(b), AND DISMISSAL WITHOUT LEAVE TO AMEND WAS WITHIN THE DISCRETION OF THE DISTRICT COURT.

This Court has recently reaffirmed the application of Rule 9(b) to complaints alleging violations of the federal securities laws, and has articulated the specificity requirements of Rule 9, in the leading cases of *Shemtob* v. *Shearson, Hammill & Co.*, 448 F. 2d 442 (1971) and *Segal* v. *Gordon*, 467 F. 2d 602 (1972). The rationale underpinning the Rule was stated in *Segal* v. *Gordon* (p. 607) and is particularly apt in this case:

> Rule 9(b)'s specificity requirement stems not only from the desire to minimize the number of strike suits but also more particularly from the desire to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing.

Plaintiffs here have patently failed to comply the first standard of *Segal* v. *Gordon*, the "general rule" that allegations of fraud cannot be based upon information and belief. *Segal* v. *Gordon, supra* at 608; 2A Moore, *Federal Practice* ¶ 9.03, p. 1928 (2d ed. 1972). The third amended complaint, like each of its predecessors and nearly every affidavit submitted by plaintiff in support of the various complaints (176a, 368a, 377a), is alleged entirely "upon information and belief". No effort is made even to identify the "meager sources of [the] assertions" (*Segal* v. *Coburn Corporation of America*, [1973] CCH Fed. Sec. L. Rep. ¶ 94,002 at p. 94,020 (E. D. N. Y. 1973)). Hence, the complaint is

fatally defective. *Segal* v. *Gordon, supra* at 608; *Competitive Associates Inc.* v. *Firefly Enterprises, Inc.*, 16 F. R. Serv. 2d 1446 (S. D. N. Y. 1972); *Segan* v. *Dreyfus Corp.*, S. D. N. Y. 72 Civ. 1551 (order entered May 11, 1973).

Plaintiffs' request that the rule be "relaxed as to matters peculiarly within the adverse parties' knowledge" (quoting *Segal* v. *Gordon, supra* at 608), and the accompanying intimation that defendants' discovery objections have prevented plaintiffs from framing a proper complaint (br. 45-46), is contradicted by the record and serves only to emphasize the purpose of Rule 9 and its particular applicability to this case. Plaintiffs have completed the depositions of defendants Brownstein and Nissan, and both witnesses produced many documents upon their examinations. Plaintiffs have had ample discovery on which to frame a pleading, which normally is done without any discovery at all. Plaintiff Felton's own justification for his motion for leave to serve the proposed second amended complaint was "new and additional facts" learned during the Nissan and Brownstein depositions (176a); one basis of Marine Midland's and Brownstein's opposition to the motion was that to permit amendment would only encourage plaintiffs' practice of altering their charges, and adding parties, by further speculation after each step in discovery. As succinctly stated by this Court in *Segal* v. *Gordon* (pp. 607-08):

> A complaint alleging fraud should be filed only after a wrong is reasonably believed to have occurred; it should serve to seek redress for a wrong, not to find one.

Permitting any plaintiff recourse to the broad discovery provisions of the Federal Rules merely to search for evidence to substantiate his fancied allegations of wrongdoing would only further encourage the "pseudo-legal harass-

ment" condemned in *Segal* v. *Gordon*. And in this case, as noted, plaintiffs' failure to supply the basis for the allegations makes the case all the stronger for dismissal.

Other general deficiencies in the third amended complaint include the failure of plaintiff to specify which sections of the "statutory law of the State of New York" or which "principles of common law" are claimed to have been violated (490a).

Turning to the allegations against Marine Midland and Brownstein,[8] plaintiffs' collective reference to the holding company and the ten banks which it controls under the generic term "Marine Midland" is a blatant flaunting of the rule. *DeMilia* v. *Cybernetics International Corp.*, [1973-1974] CCH Fed. Sec. L. Rep. ¶ 94,364, at p. 95,234 (S. D. N. Y. Jan. 16, 1974). Plaintiffs make no effort to identify a single act of any of the constituent banks which is claimed to have defrauded them. This attempt to add banks throughout the state was strenuously objected to when utilized for the first time in the proposed second amended complaint; it is indicative of the lack of care taken in pleading the amended complaint,[9] and of the conclusory nature of plaintiffs' allegations generally.

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[8]Discussion in this brief is limited to the allegations against Marine Midland and Brownstein; however, the allegations against the other defendants are equally defective.

[9]Another enlightening example of plaintiff Felton's engrafting his own speculation into "information and belief" allegations in a complaint is his reference to the Brownstein report on 3i in the original and first amended complaints. Despite the reference to a report and the contention that it contained "false and/or misleading statements", plaintiff admitted that prior to his deposition he had only seen the report once (F 203-204), *after* his final purchase of 3i stock (F 242) and that he only "scanned" the report at that time. In fact, plaintiff requested, and was granted, an adjournment of his deposition when first presented with the Brownstein report, so that he could study it overnight to give him "a chance to look it over and spend as much time in looking at it so I can give you a considered answer" (F 153-160).

The allegations that Brownstein "conspired and schemed" with other defendants "with the knowledge, assistance and connivance of" Marine Midland "to present to the investing public . . . a false and inflated present and future financial picture of [3i] and a false and misleading picture of [3i] as an expanding company making major viable acquisitions" (497-498a) are plainly conclusory, without the particularity required by Rule 9, as Judge Bonsal found:

> While the amended complaint alleges that defendants made 'misleading statements', 'conspired and schemed', 'aided and abetted' each other, and 'deceptively declared to the investing public' that [3i] had made 'major viable acquisitions', these statements and declarations are not identified nor particularized as to when they were made, to whom they were addressed, or whether they affected or related to transactions in [3i] stock. Nor do plaintiffs allege in what respect the declaration of statements were false, misleading, or deceptive except to make conclusory allegations such as, for example, that the data bank license purchased by [3i] was 'worthless' and that defendants 'approved, authorized and/or acquiesced in the fraud perpetrated upon plaintiff and the Class.' (462a).; compare *Zammas* v. *Jagid,* [1973-1974] CCH Fed. Sec. L. Rep. ¶ 94,342 (S. D. N. Y. Dec. 28, 1973).

Similarly, the allegations in paragraph 28(f) of the third amended complaint (498a), that Brownstein's report on 3i "[d]eceptively grossly understated the [3i] loss of earnings" for 1970, "[d]eceptively grossly over-estimated unfounded [3i] earnings" for 1971 and 1972, and "[d]eceptively stated a P/E ratio" for 3i stock, in no way indicate

how, why, or in what respect these items are "deceptive" or "fraudulent". The report was based on public information (there is no allegation of inside information) and was prepared solely for use within Marine Midland; and despite the attention paid to the report in plaintiffs' brief, plaintiff Felton admitted that he never even saw it until after his final purchase of stock (F203-204) and never carefully read it until after the first day of his deposition (F153-160).

The most glaring example of inadequate allegations are plaintiffs' persistent attempts to unite the varied activities of different and unrelated defendants into "a common scheme and common course of fraudulent action" (495a). Allegations of "conspiracy" and "common course of conduct" fill the proposed second amended complaint; in the third amended complaint, they are fewer in number, but no less conclusory. Allegations of conspiracy alone, no matter how often pleaded, do not satisfy Rule 9. *Segal* v. *Gordon, supra* at 607, and cases cited; *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 182 F. Supp. 18, 31 (S. D. N. Y. 1960); *Heart Disease Research Foundation* v. *General Motors Corp.*, 463 F. 2d 98, 100 (2d Cir. 1972) (". . . although the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal"). As in *Segal* v. *Gordon*, the complaint and conspiracy claims here are obviously based more on an examination of Rule 10b-5 and Fed. R. Civ. P. 23 than on an investigation of any "facts" of an alleged fraud.

Plaintiffs seem not seriously to challenge the insufficiency of their generalized allegations; rather, citing Mr. Felton's affidavit (*e.g.*, br. 20-24, 29-30, 39), they attempt to detail to this Court the so-called conspiracy—while at

the same time attacking the District Court for considering matters outside the complaint.[10] Plaintiffs note that Main LaFrentz renewed its motion for summary judgment, that Judge Bonsal acknowledged this and acknowledged reading the papers submitted on that motion, and that "plaintiffs had presented the lower Court with two (2) affidavits with exhibits annexed, memoranda with exhibits annexed and relevant portions of defendants' testimony" (br. 17), and conclude that "Judge Bonsal committed reversible error when he failed to convert the defendants' motions [to dismiss] into summary judgment motions" (*ibid.*). A reading of the order granting the motions reveals, however, that in evaluating the sufficiency of the third amended complaint no record document other than that complaint is even referred to, much less relied upon. The order specifically notes that the Court did not reach the motion for summary judgment (563a). The fact that testimony, exhibits, and affidavits were presented to the Court on other motions does not imply that they were considered on the motion to dismiss; district judges are often called upon to receive matters on various motions or at trial which later must be excluded with respect to a particular decision. *See, e.g.*, Fed. R. Civ. P. 43(c). Plaintiffs' argument flies in the face of the express disclaimer of ruling on the summary judgment motion and the lack of reference in the decision to any record document except the complaint, and would permit any plaintiff to circumvent pleading requirements by flooding the District Court with his own affidavits and other papers.

Similarly, plaintiffs' argument that the defendants "waived" the specificity requirement by answering the first

[10] In this respect plaintiffs' brief is internally inconsistent. While first arguing that Judge Bonsal "accept[ed] . . . matters outside the pleading" (br. 17), plaintiffs later contend that the motions to dismiss were determined "*in vacuo*, by merely reading the complaint" (br. 53). As discussed above, the latter statement is correct.

amended complaint (br. 40-42) is unfounded. To be sure, Marine Midland and Brownstein answered the first amended complaint; their motions to dismiss, however, were addressed to the third amended complaint, which plaintiffs were required to serve after the District Court *sua sponte* dismissed the first and second amended complaints. Plaintiffs' statement that the third amended complaint is merely a "short and concise version" of the first and second amended complaints is inaccurate, a fact apparent from reading the documents.

The Court may also give short shrift to plaintiffs' contention that even if the dismissal were proper, Judge Bonsal should have granted them leave to amend their complaint for the fourth time. The inaccurate statement that Judge Bonsal in his opinion (558a) mischaracterized his oral directions to plaintiff concerning a "final" amended complaint is beside the point on the present appeal, since Fed. R. Civ. P. 15(a) governs permissive pleading amendments:

> . . . otherwise [than by amendment as of right] a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Plaintiff Felton, an attorney and a certified public accountant (F 7), has already been given three opportunities to correct the defects in his original complaint. In similar circumstances this Court in *Mooney* v. *Vitolo,* 435 F. 2d 838, 839 (2d Cir. 1970), stated:

> Plaintiffs here were twice given an opportunity to replead. Therefore, it was within the sound discretion of the District Court to deny leave to replead on the third attempt. Fed. R. Civ. P. 15(a); *Dosteri* v. *Crowley,* 394 F. 2d 1078 (4th Cir. 1968);

Kansler v. *H. A. Seinscheimer Co.*, 347 F. 2d 740 (7th Cir.), *cert. denied* 382 U. S. 837 (1965); *Shall* v. *Henry*, 211 F. 2d 226, 231 (7th Cir. 1954).

Plaintiffs' one-sentence reference (br. 51) to the proposition that leave to correct "technical defects of pleading" should have been granted badly misses the mark, since failure to comply with a fundamental rule of federal pleading can scarcely be described as a "technical defect". The protracted proceedings in the District Court, including much unnecessary motion practice generated by plaintiffs' failure to honor the Federal Rules, have already been an expensive and time consuming burden to Marine Midland and Brownstein. Compare *Sloan* v. *Canadian Javelin, Ltd.*, [1973-1974] CCH Fed. Sec. L. Rep. ¶ 94,579, at p. 96,033 (S. D. N. Y. May 30, 1974). The interest of justice would not be served by permitting further harassment of defendants with a new complaint that promises only more of the same conclusory and speculative charges, probably against new defendants. The decision not to permit further amendment was obviously correct and well within the trial court's discretion.

II

THE DISTRICT COURT'S FINDINGS THAT PLAINTIFFS FAILED TO SATISFY THE CRITERIA OF RULE 23 WERE WELL WITHIN ITS DISCRETION AND FULLY SUPPORTED BY THE RECORD.

Plaintiffs acknowledge (br. 52-53) that "the judgment of the trial judge in a Rule 23 motion should be given the greatest respect and the broadest discretion", citing *City of New York* v. *International Pipe and Ceramics Corp.*, 410 F. 2d 295, 298 (2d Cir. 1969). Plaintiffs' attack on

Judge Bonsal's order denying class action[11] is based on the proposition that Judge Bonsal "close[d] his eyes to the facts of proof presented to him by plaintiff" (br. 52), asserting "the lower court determined these Rule 23 criteria in the same manner as it erroneously determined defendants' motion to dismiss, i.e., *in vacuo,* by merely reading the complaint" (*Id.* at 53).

Judge Bonsal's decision denying the class action motion was based on findings that plaintiffs had failed to satisfy the requirement of Rule 23(b)(3) that "the questions of law or fact common to the members of the class predominate over any questions only affecting individual members" and the requirement of Rule 23(a)(4) that "the representative parties will fairly and adequately protect the interests of the class." Since the plaintiff seeking class action certification must satisfy all the criteria under subsections (a) and (b)(3) of Rule 23, either finding, if not clearly erroneous (Fed. R. Civ. P. 52), will suffice to defeat the class action motion. In fact, both findings are fully supported by the record before the District Court.

The deposition testimony of plaintiff Felton confirms Judge Bonsal's finding that, even if there were questions common to the class, they would not predominate over individual questions. Felton testified that he relied almost exclusively upon the oral statements of his stockbroker in making his various purchases of 3i stock.[12] The only document seen by Mr. Felton prior to any purchase was the company's annual report for 1970, which he only "looked

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[11]The effect of the denial of class action motion is that the dismissal is binding only on the present plaintiffs, and notice of dismissal need not be sent to the proposed class. *Dolgow* v. *Anderson,* 53 F. R. D. 664, 690 (E. D. N. Y. 1971), *aff'd* 464 F. 2d 437 (2d Cir. 1972).

[12]See, e.g. F101, 106, 109-110, 121-122, some of which is quoted at pp. 36-37 of plaintiffs' brief.

at" to corroborate a statement by his stockbroker (F113). Although plaintiff refers in the third amended complaint to reports written by defendant Brownstein, he admitted in deposition that he never saw any such report until after his last purchase of stock (F242).

Courts and commentators have unanimously recognized that oral representations by a broker to his customers by their nature vary from person to person, and therefore a claim under the federal securities laws based upon such representations is singularly inappropriate for class action treatment under Rule 23(b)(3). *See, e.g., Morris* v. *Burchard,* 51 F. R. D. 530, 534 (S. D. N. Y. 1971); *Moscarelli* v. *Stamm,* 288 F. Supp. 453 (E. D. N. Y. 1968); *Simon* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 482 F. 2d 880 (5th Cir. 1973); 6 Loss, *Securities Regulation,* 3947 (2d ed. 1969); *Advisory Committee Note to Proposed Rules of Civil Procedure,* 39 F. R. D. 69, 103 (1966). As stated in *Skydell* v. *Mates,* [1972-1973] CCH Fed. Sec. L. Rep. ¶ 93,538 (S. D. N. Y. 1972), at p. 92,566:

> Most instances of communication were in response to inquiries from customers. Therefore, any representations made to plaintiff, fraudulent or otherwise, would not necessarily have been made to other members of the putative class. There is thus a separate question of fact, with respect to each customer, as to whether [the stockbrocker] made fraudulent or misleading statements about the [company].

Just as plaintiffs' conclusory allegations of "conspiracy", "fraudulent combination", or "common course of conduct", no matter how often repeated, cannot satisfy the specificity requirements of Rule 9, they cannot tie together disparate transactions, documents, and oral statements referred to in the third amended complaint for pur-

poses of Rule 23(b)(3). The only connection among these alleged activities, varied in nature and in time, is plaintiffs' conjectural and speculative allegation that all were done over a twenty-two month period as part of a conspiracy to inflate the price of 3i stock to their detriment. The cases cited by plaintiffs (br. 54-55) were based on a *factual* nexus among the statements alleged as part of the course of conduct; there is no such nexus here.

Moreover, even accepting the disjointed statements in the third amended complaint as alleging a common course of conduct, the mere allegation will not suffice to unite all the activities for purposes of defining a class, thereby permitting an expansion of the class and a glossing over of problems of proof of reliance, of discriminating among defendants in allocating responsibility for specific statements, and of determining the materiality of individual statements, all of which are essential to plaintiffs' cause of action. As stated by Judge Lasker in *Robinson* v. *Penn Central Co.*, [1972-1973] CCH Fed. Sec. L. Rep. ¶ 93,772, at p. 93,369 (S. D. N. Y. 1973):

> It would be wholly unjustified to allow the complex and costly machinery of a class action to clank into gear solely on the basis of a conclusory allegation of conspiracy.

Were the contrary true, any lawyer, simply by writing the allegations of a complaint, could convert a personal claim against a broker's bad advice into a vehicle for recovery of a fee for representing an undefined "class". Judge Bonsal's decision in this case was based, not upon the complaint *in vacuo,* but upon a record which demolished the class allegations of the complaint.

The District Court based its conclusion that plaintiffs could not adequately represent the interests of the proposed

class on two grounds. The Court noted that Mr. Felton was "a single practitioner . . . in the 'negligence field' " who had never before been designated a class representative or counsel to a class in any sort of class action, and concluded that his "experience and skills in negligence litigation do not qualify him adequately to protect the interests of the class he seeks to represent" (563a).

Again, this is consistent with the record and suggested by the Court's personal observation of Mr. Felton's performance. Mr. Felton testified in deposition that his only other venture into the field of securities litigation was another *pro se* action, against Equity Funding Corporation of America (F16-17), one of many such suits which have since been transferred to California by the Judicial Panel on Multidistrict Litigation. Plaintiffs' summary of Mr. Felton's "preparation" for this case and his "resolve" to protect the class (br. 56-57) cannot obscure his lack of experience, which is clearly revealed by his admitted failure to make an estimate of expense needed to prosecute this case on behalf of a class (F50), by his offhand remark that "the major part of the cost of this case is the time to me . . . getting notices out and conducting the discovery" (F324), and by his admission that he has never read the Securities Act of 1933 and the Securities Exchange Act of 1934 in their entirety (F44). Whatever abilities Mr. Felton may possess in negligence litigation,[13] he has demonstrated no expertise for the "different task and responsibility" of prosecuting a highly complex case in a field new to him,

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[13]The suggestion that "it was error . . . to nebulously lump the civil torts of these defendants into 'securities litigation' " (br. 55) warrants a brief comment. Although plaintiffs do claim violation of unspecified statutory provisions and common law principles (see pp. 3, 11 *supra*) the thrust of the complaint is a violation of the Securities Exchange Act of 1934 (489-490a) and the principal basis of jurisdiction is Section 27 of that Act (490a).

much less to insure that the interests of absentees will be safely entrusted to his care. *O'Connor* v. *G. C. A. Corp.*, [1973] CCH Fed. Sec. L. Rep. ¶ 94,057, at p. 94,255 (S. D. N. Y. 1973).

Moreover, Mr. Felton's conduct in this litigation is evidence satisfactory to support Judge Bonsal's conclusion that Mr. Felton's lack of familiarity with the nuances and requirements of federal practice or of securities litigation is such as to disqualify him from class representation. Mr. Felton's four complaints have been dismissed for failure to comply with Rule 9. He frequently sought, without success, to obtain discovery (28a, 29a) in violation of the District Court's order of July 13 that "plaintiff will not have any depositions or other discovery . . . returnable until after the completion of [the deposition of plaintiff]" (21-22a), without ever moving for modification of that order. He forced defendants to burden the District Court with motions that are unnecessary in nearly every case: a motion to compel plaintiff Felton's deposition (72a) and a motion for an adjournment of plaintiffs' class action motion (172a); on the former motion, plaintiff refused to sign a proposed order embodying his agreement with defense counsel announced only hours earlier in open court. Lack of familiarity with local and procedural rules and practice are indicia of inadequate class representation. *Taub* v. *Glickman*, 14 F. R. Serv. 2d 847, 849 (S. D. N. Y. 1970); *Shields* v. *Valley National Bank of Arizona*, 56 F. R. D. 448, 449-450 (D. Ariz. 1971). Mr. Felton's conduct in the prosecution of this case demonstrates that he cannot satisfy Rule 23(a)(4).

Courts have recognized an inherent conflict of interest when a lawyer tries to serve as both plaintiff and self-styled attorney for the class. *Cotchett* v. *Avis Rent-A-Car System, Inc.*, 56 F. R. D. 549, 554 (S. D. N. Y. 1972);

Kriger v. *European Health Spa, Inc.*, 56 F. R. D. 104, 105 (E. D. Wis. 1972). Mr. Felton's frank admission that his primary interest in this litigation is recovery of a fee as class attorney attests to the reasons for that concern and further supports Judge Bonsal's finding of inadequate representation. Mr. Felton stated in deposition (F313-315; quoted in full at pl. br. 59-61) that:

> Q. You are looking for a fee for yourself, aren't you?
>
> A. I certainly am.
>
> Q. That was part of the motivation for you making this suit a purported class action, was it not?
>
> A. May I say in answer to you. I could not afford the time it would take on this particular case if I didn't have this in mind. That is one of the main purposes of Rule 23, . . .

Capable counsel is perhaps the most important factor in assuring adequacy of representation under Rule 23(a)(4). *Korn* v. *Franchard Corp.*, 456 F. 2d 1206, 1208 (2d Cir. 1972); *Berland* v. *Mack*, 48 F. R. D. 121, 127 (S. D. N. Y. 1969). Class counsel's fiduciary obligations to persons not before the Court demand a "high quality of objectivity, duty and integrity", *Shields* v. *Valley National Bank, supra* at 449-450; *see also Greenfield* v. *Villager Industries, Inc.*, 483 F. 2d 824, 831-832 (3d Cir. 1973); and these qualities are not consonant with primary interest in recovery of an attorney's fee. Judge Bonsal carefully examined Mr. Felton's qualifications to serve as counsel to the class, and the conclusion that he was not qualified to do so is incontrovertible on the record.

Stripped of lengthy quotations and personal attacks on Judge Bonsal and defense counsel, plaintiffs' argument that "[h]ad [Judge Bonsal] considered all the facts presented, he would have granted plaintiffs' motion" (br. 64) is nothing more than indignation at the District Court's refusal to accept as "fact" their counsel's fanciful and conclusory speculation about conspiracy and fraud. Appellate courts do not sit to second guess such decisions. Evaluation of the criteria of Rule 23 is, as plaintiffs acknowledge, to be accorded "the greatest respect and the broadest discretion"; the record in this case demonstrates beyond peradventure that the District Court was well within its discretion in denying plaintiffs' class action motion.

CONCLUSION

For the foregoing reasons, the order of the District Court dismissing the third amended complaint without leave to amend, and denying plaintiffs' motion for class action certification, should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

ROBERT R. FELTON, et ano., :

Plaintiffs-Appellants, :

-against- : 74-1581

WALTSON AND CO., INC., et al., :

Defendants-Appellees. :

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE A. SCHOLZE, being duly sworn, deposes and says that he is an attorney associated with Sullivan & Cromwell, attorneys for Marine Midland Bank-New York and Joel Brownstein; that on the 25th day of September, 1974 he served two copies of the brief of Defendants-Appellees Marine Midland Bank-New York and Joel Brownstein on Robert R. Felton at his office at 42 Third Avenue, Mineola, N.Y. 11501 by delivering two copies of the same to and leaving the same with a person in charge of said office.

George A. Scholze

Sworn to before me this
25th day of September, 1974

Eileen L. Franklyn
Notary Public

EILEEN L. FRANKLYN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-1303130
Qualified in New York County
Commission expires March 30, 1976

Service of two (2) copies of the within brief is hereby acknowledged this 25th day of September, 1974.

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